IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2537 OF 2002

Bombay Hospital Trust and Anr. ..Petitioners

Vs.

Dr.Shailesh Hathi and Anr. ..Respondents

Ms.Geetanjali Prabhu a/w Mr.C.U.Singh i/b Sanjay Udeshi and Co. for the petitioners

Mr.S.K.Talsania a/w Vijay Menon for the respondent no.1

CORAM : S.U.KAMDAR, J
DATED : 24TH MARCH, 2006

ORAL JUDGMENT:

1. The present petition challenges the Award passed by the IX Labour Court in Reference (IDA) No.444 of 2002 dt.19.01.02. Some of the material facts of the present case are as under:

2. The petitioner is a Charitable Trust, registered under the Indian Public Trust Act, 1950 and are running a Hospital in the name and style of

'Bombay Hospital'. Sometime in or about 1974 the Respondent no.1 who is a Physiotherapist joined a doctor known as Rambhai Patel as an Assistant. The said Doctor, Rambhai Patel was attached as a Doctor to the petitioner Hospital.

3. The respondent no.1 thus started working in the Physiotherapy Department of the Hospital and was giving the exercise to the patients manually as well as by Electro Therapeutic Machine.

4. On 19.11.90, Dr.Rambhai Patel discontinued the services of the respondent no.1. Being aggrieved by the said action, the respondent no.1 raised an Industrial Dispute under section 10 read with section 2A of the Industrial Disputes Act, 1947 and demanded that the Respondent no.1 should be reinstated with full back wages in the Hospital. He contended that the termination of services of the respondent was illegal because of non-conducting of a departmental enquiry. He also contended that he was an employee of the petitioner hospital. On 1.10.93 the conciliation proceeding having failed the Conciliation officer referred the

dispute to the IX Labour Court for adjudication. The petitioner filed a written statement and raised interalia a dispute that there is no employer-employee relationship between the petitioners and respondent no.1 and further it was contended that the respondent no.1 cannot be treated as a workman.

5. By an award dt.19.01.02, the IX Labour Court has granted reinstatement of the respondent no.1 with the petitioner hospital and also directed that he should be paid 15% back wages with continuity of service. It is this award passed by the IX Labour court is under challenge in the present petition.

6. The learned counsel for the petitioners has interalia contended before me that there is no master servant relationship or employer-employee relationship between the petitioners and the respondent no.1 herein. The learned counsel for the petitioners has contended that the respondent no.1 was never appointed in any service of the petitioners herein. The learned counsel for the

petitioners contended that the respondent no.1 is infact a Physiotherapist meaning thereby a qualified doctor and had joined Dr.Rambhai Patel who was a Senior Physiotherapist as his assistant. It has been further contended that the petitioners had issued no letter of appointment to the respondent no.1 nor the respondent no.1 was at any point of time on the role of the petitioners herein. It has been contended by the petitioners that the respondent no.1 was carrying on activity of a Physiotherapist in the physiotherapy department of the petitioners as an assistant to the Dr. Rambhai Patel and not as an employee of the petitioners herein.

7. It has been contended by the petitioners that even the payments to the respondent no.1 were never paid as a salary by the petitioners but was paid out of the fees collected by the Hospital of the Senior Doctor, Rambhai Patel and a percentage of the said fees was disbursed to the respondent no.1 herein. It has been further contended by the learned counsel for the petitioners that there is no evidence whatsoever on record which even

suggests that the respondent no.1 was in a normal and regular employment of the petitioners herein. It has been contended that the Assistant to the Senior Doctors are not the employees of the Hospital but they are in the nature of junior Assistant to the said doctors and there is a relationship of Senior and Junior between the Senior Doctor and Junior Doctor. Thus, it is not permissible for the respondent no.1 to claim any such master servant relationship between the petitioners and respondent no.1. The learned counsel for the respondent no.1 has further contended that even a letter of dis-association has been issued by the said Dr. Rambhai Patel on 19.11.90 and not by the petitioners herein. Thus, there is no material on record on the basis of which the IX Labour Court has come to the conclusion that the respondent no.1 is an employee of the petitioners and has directed the order of reinstatement with 15% back wages. The learned counsel for the petitioners has thus, contended that the order passed by the IX Labour Court is perverse, based on no material evidence and totally contrary to the records produced by the parties.

8. The learned counsel for the petitioners has thereafter contended that in any event the respondent no.1 cannot be treated as a workman because the nature of work which was carried out by him was of a skilled nature as Physiotherapist and was in fact acting as a Supervisor because he was in charge of the department in absence of Dr.Rambhai Patel and he was giving orders and directions to the employees of the said department. Thus, in that view of the matter, the respondent no.1 cannot be treated as a workman under section 2(s) of the Industrial Disputes Act, 1947 and thus, the reference was not maintainable by the respondent no.1 before the Labour Court.

9. The learned counsel for the petitioners has further admitted that the discharge of the respondent no.1 was without any departmental enquiry but has been contended that in view of the fact that the respondent no.1 was not an employee of the petitioners the question of conducting any departmental enquiry by the petitioners does not arise.

10. On the other hand, the learned counsel for the respondent no.1 has contended that there has been a master servant relationship. In support of the aforesaid contention, the learned counsel has relied upon various documents, the compilation of which has been filed before me and according to the respondent no.1 the same forms part of the record before the Trial Court. The learned counsel for the respondent no.1 has supported the finding of the trial court that there is a master servant relationship on the basis that salaries were paid by the petitioner hospital and thus, the master servant relationship has been established. He has also relied upon certain certificates forming part of the compilation.

11. In so far as issue of workman is concerned, the learned counsel for the respondent no.1 has contended that though the respondent is a skilled person on the basis of degree of Physiotherapist but his job is to exercise the patients and thus, the work carried out by him is of perennial nature and therefore, the finding of the Labour Court that

the respondent no.1 is a workmen within the meaning of section 2(s) of the Industrial Disputes Act, 1947 is legal and correct and dose not call for any interference by this court under Article 226 of the Constitution of India. He has also reiterated a well settled proposition of law that in writ jurisdiction under Article 226 of the Constitution of India, this court must not re-appreciate or re-examine the evidence before the Trial Court or go into the adequacy or inadequacy of the material produced by the parties before the Labour Court. In the aforesaid circumstances, he has contended that the present writ petition is liable to be dismissed and no relief should be granted to the petitioners herein.

12. On consideration of the contention of either parties, it is necessary to examine whether the respondent no.1 has established that there is a master servant relationship. The finding given by the Trial Court is based on only two materials, namely, the salary certificates which are produced before the Labour Court. He has also relied upon two certificates dt.1.10.76 and 12.1.82 which are

issued by the Bombay Hospital. In so far as evidence which has been produced by the respondent no.1 is concerned, in my opinion, even on accepting the evidence as a whole, no case is made out between the petitioners and respondent no.1 as a master servant relationship. The salary certificates are issued in the name of the respondent no.1 which are at page 1 to 5 of the compilation which is tendered before me. The same are signed by Dr.Rambhai Patel and it is not issued by the petitioner hospital at all. The certificate dt.1.10.76 and 12.1.82 which were issued for the purpose of telephone connection only states that the respondent no.1 is working in the Bombay Hospital as a Physiotherapist but it does not state that he has been working as an employee of the petitioners at all.

13. On the other hand, the petitioners have produced various details. Firstly, it has been shown that there is no material whatsoever produced by the petitioners to show any direct master servant relationship between the petitioners and respondent no.1 herein. He has also pointed out

that the payments which are made by the Hospital are infact made from the fees recovered from the various patients for and on behalf of Dr.Rambhai Patel and not of their own. It has been pointed out that there is no appointment letter and at no point of time there was even a suggestion of master servant relationship between the petitioners and the respondent no.1. It has also been pointed out to me that it is an admitted fact that the respondent no.1 was also getting a percentage of the fees which was fixed between the parties which was 10%. over and above salary, from the fees of Dr. Rambhai Patel. It was also pointed out to me that in fact respondent no.1 was also carrying on his own practice by treating his own patients and contended that all these material evidence which is produced before the Trial Court has been ignored by the Trial Court thoroughly and by referring on the so-called salary certificates indicating the payment by the hospital from the fees collected by the Dr.Rambhai Patel, the relationship is sought to foist on the petitioner of master servant relationship between the petitioners and the respondent herein.

14. It is an admitted position that the respondent no.1 was getting money from the fees of Dr. Rambhai Patel. It is also an admitted position that Dr. Rambhai Patel was also paying to the respondent over and above fixed amount of 10% from out of the collection of the Physiotherapy Department per month which was an arrangement arrived at by and between Dr.Rambhai Patel and the respondent no.1 herein.

15. The learned counsel has also pointed out that there is no dispute that respondent no.1 is doing his own private practice. In that circumstances, the finding given in para 11 of the Judgment that the salary certificate does not mention the word ’honorarium’ and uses the word ’salary’ as the same are issued by the Dr. Rambhai Patel, indicates a master servant relationship between the petitioners and the respondent no.1 is totally perverse. In my opinion, to establish a master servant relationship, it is necessary that an employee who is claiming to be an employee of a particular employer should show a series of acts

which he has conducted and established that there is always been a master servant relationship between the parties. The most essential evidence which is required to be produced is control exercised by the employer in discharge of duties by the employee. A mere of a cuff evidence of salary certificates which are also issued by Dr.Rambhai Patel and not by the petitioner or two letters which are given to the respondent no.1 for the purpose of telephone connection stating he is working in Bombay Hospital, would not establish a master servant relationship between the parties. On perusal of the Judgment, the finding given in para 11 is unsustainable in law on the basis of material on record which do not indicate any evidence whatsoever to establish a master servant relationship between the petitioners and respondent no.1. The Labour Court could not have arrived at any such finding that their exist a master servant relationship between the petitioners and respondent herein on the basis of such evidence. In my opinion, the finding given is perverse and is required to be set aside.

16. On the overall consideration of material and evidence which was produced before the court, it is very clear that the respondent no.1 has failed to discharge a burden on him to establish master servant relationship between the petitioners and respondent no.1 herein. Thus, the finding given by the labour court is required to be interfered with.

17. Even on the other point, namely the Respondent no.1 is a workman. I am not satisfied with the finding given by the Labour Court. The Labour court has held that the physiotherapist job is to help the person to do the exercise and thus, it is a perennial nature of work and therefore, respondent no.1 is a worker. In my opinion, the physiotherapist job is not perennial nature of work. It is highly specialised skilled job and is in the nature of job of a Doctor. Apart from the aforesaid, it cannot be said that the person holding a degree of Physiotherapist is a workman because he is carrying on work of a helping the patient to exercise. In fact a treatment given by the physiotherapist to the patients and not a

perennial nature of work as held by the labour court. Thus, even the aforesaid finding arrived at by the labour court that the respondent no.1 is a worker under section 2(s) of the Industrial Disputes Act, 1947 is unsustainable in law.

18. However, the learned counsel for the respondent no.1 has relied upon the judgment of the Supreme court in the case of Indian Banks Association V. Workmen of Syndicate Bank and Ors reported in 2001 1 CLR 986 particularly 24, 25 and 26 thereof which reads as under:

> "24. We have considered the rival submissions. In our view, Mr.Sharma was right when he submitted that on the basis of evidence before it the Tribunal has given findings of fact that the deposit collectors were workmen within the meaning of Section 2(s) of the Industrial Disputes Act. On the evidence on record it would not be said that this finding was unsustainable. Having been shown the relevant evidence we are also of the opinion that the Tribunal correctly arrived at a conclusion that these deposit collectors were workmen.
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> 25. Further, as seen from Section 2(rr) of the Industrial Disputes Act, the commission received by deposit collectors is nothing else but wage, which is dependent on the productivity. This

> commission is paid for promoting the business of the various banks.
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> 26. We also cannot accept the submission that the banks have no control over the deposit collectors. Undoubtedly, the deposit collectors are free to regulate their own hours of work, but that is because of the nature of the work itself. It would be impossible to fix working hours for such deposit collectors because they have to go to various depositors. This would have to be done at the convenience of the depositors and at such times as required by the depositors. If this is so, then no time can be fixed for such work. However, there is control inasmuch as the deposit collectors have to bring the collections and deposit the same in the banks by the very next day. They have to then fill in various forms, accounts, registers and pass books. They also have to do such other clerical work as the bank may direct. They are, therefore, accountable to the bank and under the control of the bank."

19. The learned counsel has contended that keeping in mind the ratio laid down by the court even the deposit collectors have been held to be an employee of the bank. In that case, there was no dispute that the deposit collectors were directly under the control and in charge of the bank and it was the bank who was giving them work and was also paying amount for the collection of deposit on the percentage basis. This facts in my opinion are

totally different. Furthermore, large amount of evidence was produced to show that in fact not only that they are doing deposit collectors job but also other clerical job in the bank such as fill in various forms, accounts, registers and passbooks and a finding was given that they are accountable to the bank and under the control of the bank and therefore in that case it was held that there was a master servant relationship. Such evidence is absent in the present case. In my opinion, the issue whether a master servant relationship exists or not is essentially an issue of fact and required to be determined on the basis of material and evidence produced before the court.

20. Thereafter, the learned counsel has relied upon the judgment of the Supreme Court in a case of Silver Jubilee Tailoring House and ors V. Chief Inspector of Shops and Establishments and another reported in AIR 1974 Supreme Court 37 particularly para 37 thereof. The reliance placed on the aforesaid judgment is misplaced. In para 38 it has been made clear that it was a case whereas a person was claiming to be in part time service of the

employer and thus, the court held that even part time service could be a contract of employment between the employer and employee. In our case, we are not considering any case of part time employee. In our case, the respondent no.1 is admittedly a Physiotherapist and is carrying on activity as Physiotherapist under Dr. Rambhai Patel as well as his own private practice which is not disputed. In that circumstance, to hold that respondent no.1 is an employee of petitioners herein, is in my opinion not possible. The evidence and record produced before the Trial Court does not establish any master servant relationship between the petitioners and the respondent no.1 herein nor it establishes that the respondent no.1 is a workman and is carrying on perennial nature of work.

21. In that light of the matter, the impugned order is unsustainable in law and is required to be interfered with under Article 226 of the Constitution of India. Thus, accordingly, writ petition is made absolute. Impugned order dt.19.01.02 passed by the IX Labour Court is quashed and set aside and the reference (IDA)

No.444 of 2002 is dismissed. No order as to costs.

22. In view of the order passed, the learned counsel for the petitioners states that the amount of back wages which was deposited in court pursuant to the impugned order should be refunded, in view of the fact that the impugned order is quashed and set aside. Office of the Prothonotary and Senior Master, High Court, Mumbai is directed to refund the said amount with accrued interest, if any.